

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-9757

File: 21-541762; Reg: 18086741

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9828
574 West Lacey Boulevard, Hanford, CA 93230,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: July 25, 2019
Los Angeles, CA

ISSUED AUGUST 8, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for Garfield Beach
CVS, LLC and Longs Drug Stores California, LLC,

Respondent: Matthew Gaughan, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #9828, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk
sold an alcoholic beverage to a police minor decoy, in violation of Business and
Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated October 10, 2018, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 1, 2014. There is no record of departmental discipline against the license.

On April 5, 2018, the Department filed a single-count accusation against appellants charging that, on December 14, 2017, appellants' clerk, Paul Corona (the clerk), sold an alcoholic beverage to 16-year-old J.D. (the decoy).² Although not noted in the accusation, the decoy was working for the Hanford Police Department (HPD) at the time.

At the administrative hearing held on July 17, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by HPD Detective Ryan Adam Tomey.

Testimony established that on December 14, 2017, Det. Tomey entered the licensed premises in an undercover capacity, followed shortly thereafter by the decoy. Det. Tomey monitored the decoy through a cell phone line which was left open during the operation.

The decoy went to the coolers and selected a 6-pack of Bud Light beer in 12-ounce bottles. He took the beer to the register and waited in line. When it was his turn, he set the beer down and the clerk asked for his identification and age. The decoy handed the clerk his California driver's license and stated that he was 16 years old. The license had a portrait configuration, contained his correct date of birth showing him to be 16 years of age, as well as a red stripe indicating that he was under the age of 21. Nevertheless, the clerk completed the sale. Det. Tomey observed and listened to the transaction from inside the store.

²We refer to the minor decoy by his initials in order to protect his privacy because he is under the age of 18.

The decoy exited the premises and went to the vehicle where another HPD officer was waiting and told him what had occurred. Det. Tomey remained in the premises. The decoy and another officer re-entered the store and joined Det. Tomey who had already informed the clerk that he had sold alcohol to a minor. The decoy was asked about the sale. He pointed towards the clerk and indicated that this was the clerk who sold him the beer. No photograph was taken of the decoy and clerk together.

When asked why he sold beer to the decoy, the clerk indicated that he misread the identification as saying 1996 for the year of birth. The decoy's actual year of birth is 2001. The clerk was subsequently cited.

The administrative law judge (ALJ) issued his proposed decision on August 7, 2018, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety on September 18, 2018, and a Certificate of Decision was issued on October 10, 2018.

Appellants then filed a timely appeal contending the ALJ's finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence, in violation of rule 141(b)(2).³

DISCUSSION

Appellants contend that the decoy “appeared during the operation as a mature, swarthy, fully developed man with a mature face and a shadow of stubble on his chin.” (AOB at p. 6.) As such, they maintain the decoy did not display the appearance required by rule 141(b)(2). Instead, they assert that the decoy appears to be over 30 years of age in Exhibit 2. (*Ibid.*)

³References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain the police used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2). They argue that the decoy's mature physical appearance violated this rule. In addition, appellants contend that the decoy's experience as a police Explorer gave him a confident and practiced demeanor. They further maintain that when the decoy handed the clerk his ID with confidence it reinforced the impression that he was over 21 years of age. Appellants contend all these factors contributed to the decoy presenting an appearance which did not comply with rule 141(b)(2).

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004))

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings regarding the decoy's appearance:

4. J.D. appeared and testified at the hearing. J.D.'s appearance during the operation was as depicted in an image that was taken on December 14, 2017 by one of the officers. (Exhibit D-2) J.D. wore blue jeans, light

colored sneakers, and a black jacket. His face was fully exposed and his black hair was short and combed back. J.D. was clean shaven on the day of the operation and he had no visible tattoos or jewelry. J.D. was approximately 5 feet 11 inches tall and 160 pounds at the hearing. J.D. credibly testified that his size and physical appearance on the date of the operation were essentially the same. His appearance at the hearing matched the image that was taken of him prior to the operation.

¶ . . . ¶

12. On December 14, 2017 J.D. was serving as a decoy for HPD for the first time. J.D. was asked to serve as a decoy from his time as an explorer with HPD. J.D. appeared his chronological age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Corona at the Licensed Premises on December 14, 2017, J.D. displayed the appearance which would generally be expected of a person less than 21 years of age during his interactions with Corona. Corona did not testify in this matter to explain his age related impressions of J.D. or why he sold J.D. alcohol after J.D. said his age and presented a portrait style driver's license that clearly depicted him as being under 21 years of age.

(Findings of Fact, ¶¶ 4-12.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) arguments:

11. Respondent also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Corona did not testify in this matter to establish that his error was the result of J.D.'s appearance or demeanor. Corona, in fact, asked for J.D.'s identification which suggests that he was concerned that J.D. might be underage. Corona did not ask any follow up questions so the exchanges between him and J.D. were minimal. Further, J.D. testified in this matter and his appearance matched how he presented to Corona on the date of the operation. His appearance was consistent with a person under the age of 21 even though it could be argued that he looked older than 16 years old. As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in J.D.'s actions, manner, or appearance that led Corona to reasonably conclude that J.D. was over 21. The Department has established compliance with rule 141(b)(2) and the Respondent has failed to rebut this evidence.

(Conclusions of Law, ¶ 11 .) We agree with the ALJ's conclusions.

This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(O'Brien (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 4-12, and Conclusions of Law paragraph 11, the ALJ found that the decoy met this standard.

Appellants argue that the decoy displayed a demeanor which was not typical for a teenager because of his one year of experience working as a police Explorer. They maintain this experience gave the decoy a confident demeanor which made him appear more mature. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In addition, appellants contend that the "simple act of handing over identification for a clerk to check is in and of itself a signal that the person offering the identification is of age." (AOB at p. 7.) It contends that a typical teenage would not readily hand over his or her identification to purchase beer. We reject this contention. The clerk did not testify — we have no way of knowing if the decoy's demeanor *actually resulted* in the

clerk making the sale. Further, there is nothing in the record indicating that the decoy's presentation of the driver's license was done "confidently," as appellants contend.

Appellants seem to suggest that the mere presentation of any driver's license, when asked, would give a decoy the appearance of someone older than 21. However, by that logic, everything a decoy does could be seen as "confident" — from presenting an alcoholic beverage to a clerk to volunteering to be a decoy in the first place. Under those circumstances, all decoys would appear over 21 years of age and the criteria of 141(b)(2) would lose all meaning.

Appellants presented no evidence that the decoy's experience, physical appearance, or demeanor *actually resulted* in his displaying the appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through his mind in the course of the transaction, or why he made the sale — in spite of looking directly at evidence to the contrary, showing the decoy to be 16 years of age, and the decoy himself stating that he was 16. There is simply no evidence to establish that the decoy's physical appearance, experience, or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.⁴

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.